

1992

Richard F. McKean v. Michael W. McBride, Alpine LTD., and Fidelity National Title Insurance Company, Geodyne II, a Utah general partnership, Dan C. Simons, and Arden J. Bodell : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ralph R. Tate Jr.; attorney for appellee.

R. Stephen Marshall; Van Cott, Bagley, Cornwall & McCarthy.

Recommended Citation

Legal Brief, *McKean v. McBride*, No. 920705 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3684

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
100
DOCKET NO.

920705

IN THE UTAH COURT OF APPEALS

RICHARD F. McKEAN,

Plaintiff and Appellee,

vs.

MICHAEL W. McBRIDE, ALPINE LTD.,
and FIDELITY NATIONAL TITLE
INSURANCE COMPANY, GEODYNE II,
a Utah general partnership,
DAN C. SIMONS, and ARDEN J.
BODELL,

Defendants and Appellants.)

Case No. 920705-CA

District Court No. C85-4003

PETITION FOR REHEARING

RALPH R. TATE, JR. (3192)
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: (801) 278-4747
Attorney for Plaintiff/Appellee

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
R. Stephen Marshall (2097)
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333
Attorneys for Defendant/Appellants

FILED
Utah Court of Appeals

NOV 22 1994

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

RICHARD F. McKEAN,

Plaintiff and Appellee,

vs.

MICHAEL W. McBRIDE, ALPINE LTD.,
and FIDELITY NATIONAL TITLE
INSURANCE COMPANY, GEODYNE II,
a Utah general partnership,
DAN C. SIMONS, and ARDEN J.
BODELL,

Defendants and Appellants.)

Case No. 920705-CA

District Court No. C85-4003

PETITION FOR REHEARING

RALPH R. TATE, JR. (3192)
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: (801) 278-4747
Attorney for Plaintiff/Appellee

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
R. Stephen Marshall (2097)
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333
Attorneys for Defendant/Appellants

RALPH R. TATE, JR. (#3192)
Attorney for Plaintiff
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: 278-4747

IN THE UTAH COURT OF APPEALS

RICHARD F. McKEAN,)	
Plaintiff and Appellee,	:	PETITION FOR REHEARING
vs.	:	
)	
MICHAEL W. McBRIDE, ALPINE LTD.,	:	
and FIDELITY NATIONAL TITLE	:	
INSURANCE COMPANY, GEODYNE II,	:	
a Utah general partnership,)	Case No. 920705-CA
DAN C. SIMONS, and ARDEN J.	:	
BODELL,	:	
Defendants and Appellants.)		

Pursuant to Rule 35, Utah Rules of Appellate Procedure, plaintiff petitions the court for an order allowing rehearing of the court decision filed by the court on November 10, 1994. Plaintiff's counsel hereby certifies that this Petition for Rehearing is brought in good faith and not to cause delay. The Petition for Rehearing is made because it appears that the court overlooked or misunderstood facts in issuing its opinion, particularly pertaining to the issue of the statute of limitations.

Plaintiff brought this action as the assignee of the New Empire Group consisting of Myron B. Child, Jr., Ronald S. Cook, Ray W. Lamoreaux, Wendell P. Hansen, and New Empire Development Company. (Opinion, footnote 2) The New Empire Group had a written

contract with Alpine, and the rights under that contract had been assigned to McKean. Defendant Alpine received \$330,000 from Richard McKean acting on behalf of New Empire, but neither McKean nor Alpine received a conveyance of land required by the contract terms. The trial court found that Alpine wrongly refused to release the property in question, which determination was not challenged on appeal. (Opinion, footnote 8) When the bankruptcy court disposed of the land, McKean's contractual right to specific performance was abrogated. Therefore, plaintiff, as assignee of the New Empire Group, brought this action to recover damages.

A number of different parties claimed encumbrances against the property. One of the New Empire Group members (Child) filed a Chapter 11 bankruptcy in 1982 claiming an interest in the subject land, thus preventing conveyance by Alpine of the land to the New Empire Group and staying any action by creditors, including McKean. On February 28, 1985, defendant Alpine purchased the land from the bankruptcy trustee free and clear of liens and encumbrances other than the encumbrances senior to Alpine which they assumed in their purchase bid. Until disposition of the land by the bankruptcy trustee's sale, plaintiff's only remedy under the contract was for specific performance to seek recovery of the land. The alternative remedy of seeking damages under the equitable principle of an implied contract did not accrue or become available

to plaintiff until the bankruptcy sale in February 1985.

The court on page 5 of its opinion finds that the statute of limitations on the written contract would have begun to run sometime between June 25, 1979, and July 3, 1980. Plaintiff's action was brought June 25, 1985, which was within the six year period which Utah Code Annotated 78-12-23 allows to bring an action "upon any contract, obligation, or liability founded upon an instrument in writing...."

This court found that if plaintiff had prayed for specific performance of the Alpine contract, the 6 year statute of limitations would apply. As long as specific performance was an appropriate remedy, it was the only remedy afforded under the written contract. The New Empire Group or McKean as assignor did not have an option to bring an action in equity or for dollar damages while the bankruptcy court had jurisdiction over the subject property. The parties stipulated that upon the sale of the land on February 28, 1985, by the bankruptcy court the ability to seek specific performance terminated. (Opinion, footnote 10) Plaintiff had claimed that the action was "founded" on the original written contract. This court held that rights under the written contract had terminated, and therefore McKean's cause of action was one of implied contract in equity. If it is to be construed that the action is one of implied contract, then the four year statute

of limitations could only begin to run when the cause of action arose on February 28, 1985. Plaintiff believes the court erred in not construing the action as one "founded" on the written contract. However, even if the action is of implied contract, the statute had not expired for the reasons outlined below.

THE COURT'S RULING AS TO THE TOLLING EFFECT OF
BANKRUPTCY IS IN ERROR AND SHOULD BE RE-EXAMINED

The right to bring an action for specific performance was stayed by the bankruptcy filed by Myron Child on February 25, 1982, because of his claim to an ownership interest in the property. The exact nature of that interest never was adjudicated in the bankruptcy court because the land was sold for less than the sum necessary to pay off priority encumbrances. The automatic stay provided under 11 U.S.C. 362 prevented any action affecting the property. It was not until February 28, 1985, when the bankruptcy trustee sold the property to defendant Alpine free and clear of liens that McKean as assignee of the New Empire Group lost his contractual right of specific performance. Thereafter he had an equitable cause of action seeking damages as his remedy.

The right of specific performance was stayed from February 25, 1982, through at least February 28, 1985, when the property was sold. As to any action involving Myron Child, the tolling time of an action affecting his interests would continue

until his bankruptcy dismissal, but that action does not appear necessary to consider. Until at least February 28, 1985, the tolling effect of U.C.A. 78-12-41 applied, which provides as follows:

When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

The court's opinion addresses the tolling effect of the bankruptcy as it affects the bankruptcy trustee, but overlooks the tolling effect on the New Empire Group members (and McKean) who were not the petitioners in bankruptcy. The bankruptcy code reference relied on by the court governs only the bankruptcy stay as it applies to the trustee for the debtor and not to other creditors. The positions of McKean and New Empire were adverse to the trustee. They were clearly creditors and had no common identity with the trustee. Nevertheless, they were prevented for over three years from seeking recovery of the real property.

The Utah Supreme Court addressed the tolling effect of bankruptcy proceedings in the case of Citicorp Mortgage v. Hardy, 834 P.2d 554 (Utah 1992). That case discusses the statute of limitations applicable to seeking a deficiency judgment after a trust deed foreclosure. The debtor filed a bankruptcy to avoid a trust deed foreclosure. The bankruptcy court allowed the trust

deed foreclosure to proceed. The debtor's bankruptcy was then dismissed without discharge (as was the bankrupt debtor in the case at bar). Even though the statute of limitations would have normally expired on seeking a deficiency judgment, the court held that the bankruptcy tolled the statute and allowed the deficiency action to proceed. The court acknowledged that creditors are precluded from instituting any action detrimental to the bankruptcy estate prior to termination of expiration of the stay. The court reversed the lower court's dismissal of the case and stated:

Utah Code Ann. §78-12-41 bears directly upon the issue presented, and its substance is wholly consistent with like provisions of the Bankruptcy Code. In similar plain and unequivocal language, the statute provides, "When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance or prohibition is not part of the time limited for the commencement of the action." Thus, under both the Bankruptcy Code and our own statute, plaintiff's deficiency action was timely filed.

In regard to the public policy considerations advanced by plaintiff, the foregoing analysis of the applicable statutory provisions has the effect of alleviating the potential for abusive filings of bankruptcy proceedings to defeat legitimate deficiency actions on statute of limitations grounds.

In the case at bar, to allow bankruptcy proceedings to interfere with the recovery of land until it is too late to bring an action in equity would be manifestly unjust and contrary to the clear

mandate of the Utah Supreme Court.

THE COURT APPEARS TO HAVE ERRED IN DETERMINING THE DATE
FOR COMMENCEMENT OF THE STATUTE OF LIMITATIONS IN AN
EQUITABLE ACTION OF IMPLIED CONTRACT

Until their rights against the land were extinguished, the New Empire Group (McKean) could not have brought an action to recover damages. The contract did not provide for a remedy of damages. The contract only provided for a remedy of conveyance of the property. Therefore, plaintiff had no remedy in equity or for damages until the land was sold on February 28, 1985, by the bankruptcy court free and clear of liens.

After the bankruptcy court sold the land, plaintiff's remedy changed. Since McKean's cause of action for specific performance was lost, his remedy became a remedy for damages or equity implied in the written contract. If plaintiff's cause of action is not considered to be founded on New Empire's written contract, then it was not until plaintiff's encumbrance against the land was lost in February 1985 that plaintiff could sue in equity to recover damages.

The court's opinion rests partially on the 1937 case of Brown v. Cleverly, 70 P.2d 881 (Utah 1937). The Brown case is readily distinguishable because the plaintiff had brought an action to nullify a written contract and received a dollar judgment. Thereafter the Cleverlys filed bankruptcy and the court discharged

the judgment in bankruptcy. The Browns brought a new action seeking equitable remedies. The court found that it had been more than 4 years after suit was filed on the initial action and therefore an action in equity was barred by the statute of limitations.

In the Brown case, the action on the breach of the written contract was commenced on May 28, 1931, and tried on the merits. No appeal was filed and the judgment became final. On August 15, 1935, Browns brought an action seeking an equitable lien on real property and provided a means of foreclosing the same. This was more than four years after the original action and the court did not allow the equitable remedy to be pled on an action previously tried on the merits. The court found that it was more than four years after the commencement of the initial action before the plaintiff first sought to impress a lien upon the real property.¹

It is noteworthy that the court considered the statute of limitations running from the time of the filing of the May 28, 1931, action to terminate the contract. The Brown court seems to

¹The initial Brown v. Cleverly action was upon a written contract and was fully adjudicated on the merits. The second action was an equitable action to impress a lien on property. Since the action on the written contract had been fully adjudicated, a new action under equity not founded upon a written contract had to be filed separately to avoid principles of res judicata.

hold that the statute of limitations commenced running when the rights under the written contract were terminated.

A significant question before this court that has not been addressed is whether McKean's equitable action should arise at the time of the breach of the written contract or at the time that the right to recover the land under the written contract is lost and the equitable action arises.

Implied assumpsit is a principle of equity normally applied when there are no written documents upon which to interpret contractual terms. In this case there was no right for the equitable relief until plaintiff's right to recover land under the written contract was terminated by the trustee's sale of the land. It is not logical that a four year statute of limitations could expire before the right to sue for specific performance under the six year statute of limitations could even occur.

While the court should not ignore the plain meaning of a statute, a statute of limitations should be liberally construed to effect the objects of the statute and to promote justice. U.C.A. 68-3-2 When any doubt exists on the application of the statute of limitations, the doubt should be resolved in favor of the longer rather than the shorter period. Hardinge Co. v. Eimco Corp., 266 P.2d 494 (Utah 1954); Juab County Department of Public Welfare v. Summers, 426 P.2d 1 (Utah 1967). In this case, if there is any

doubt as to whether the cause of action applies under a six year statute of limitations, a tolled four year statute, or a new cause of action commencing in 1985, that doubt should be resolved in plaintiff's favor.

In the case of Davidson Lumber Sales v Bonneville Investment, Inc., 794 P.2d 11 (Utah 1990), the Utah Supreme Court addressed the issue of the commencement date of the statute of limitations under a contract implied in law. This arose out of a personal injury case resulting from a defective product. After settling the personal injury suit, the seller filed suit against the manufacturer to recoup the damages paid to settle the first suit. The court held that the action against the manufacturer was timely brought even though it was more than four years after the injury occurred or the product was purchased. The court held:

A common-law indemnity action is based on a theory of quasi-contract or contract implied in law and is generally held to be governed by the statute of limitations applicable to actions on implied contracts. A common-law indemnity action is, therefore, wholly distinct from the underlying action which gave rise to the right of indemnity. One commentator has stated:

"An action on an implied contract of indemnity is wholly independent as a cause of action from the transaction or situation which gave rise to the right of indemnity. Although the right to indemnity may arise out of a tort, the action to enforce the right usually is not governed by the statute relating to the tort. Similarly, a right of indemnity which

arises out of an express contract to pay money or perform some other act generally is not governed by the statute of limitations applicable to an action upon an express contract, where such statute is distinct from the statute governing actions upon implied contracts."

Annotation, What Statute of Limitations Covers Action for Indemnity, 57 A.L.R.3d 833, § 3 (1974).

* * *

A common-law indemnity action does not arise when the underlying damage occurs; rather, it runs from the time of the payment of the underlying claim or the payment of a judgment or a settlement. See Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 218 (Utah 1984); Annotation, When Statute of Limitations Commences to Run Against Claim for a Contribution or Indemnity Based on Tort, 57 A.L.R.3d 867, § 3[a] (1974).

The cause of action under implied contract in the Davidson case did not arise until all of the economics of the cause of action came into being. Likewise, the cause of action in the case at bar did not arise until the right to recover the real property was lost by the trustee's sale on February 28, 1985, and the plaintiff thereafter had an equitable action to recover an implied remedy.

In Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984) the court held that in an action arising under an implied contract, "the statute of limitations on an indemnity action does not begin to run until the cause of action accrues,

even though the statute of limitations on the underlying action may already have run." See also Salt Lake City Corp. v. Kasler Corp., 842 F.Supp. 1380 (D.Utah 1994)

In the case at bar, the statute of limitations of the separate cause of action for damages under an implied contract could not have arisen until February 28, 1985, when the real property was sold and the rights of specific performance were terminated.

SHOULD THE CASE HAVE BEEN DISMISSED AS MOOT

As a secondary issue, the court held that the defendants' appeal was not "moot" (Opinion, footnote 6). The court relied in part on the case of West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1316 (Utah App. 1991). That case held that when a party satisfies a judgment at a lower level it does not make the issue moot or waive the right of appeal "when the right of appeal has been specifically reserved by stipulation between adverse parties." The West Valley City case needs to be distinguished from the case at bar. It only involved a partial satisfaction of judgment and the stipulation was between the adverse parties.

In that case the adversarial parties stipulated that neither party waived any right of appeal. In the case at bar, a total satisfaction of judgment was filed by parties who were business partners of the defendants who had acquired an interest in

the judgment through an execution sale. The defendants entered into the stipulation which allowed a continuation of an appeal. However, neither McKean nor his attorney were parties to that stipulation. The parties to the stipulation were working together for their mutual benefit to avoid payment of attorney's fees. McKean's attorney had a vital interest in the protection of his attorney's lien and was not informed of the stipulation or made a party to it. In effect, the defendants were the buyers of their own judgment and continued the appeal solely to avoid paying the attorney's lien.

The case at bar is more closely related to Jacobsen, Morrin & Robbins Construction Company v. St. Joseph High School, 794 P.2d 505 (Utah App. 1990). Also significant is the very recent Utah Supreme ruling on September 14, 1994, John H. Klas v. Van Wagoner, Sup. Ct. Case No. 930504 (unpublished but attached). The court dismissed an appeal as moot because a total satisfaction of judgment had been entered by the lower court even though the lower court had authorized the appellant to pay the judgment and continue the appeal. It would be appropriate for the court to review its decision as to the mootness of the appeal.

SUMMARY

Plaintiff requests the court for a rehearing for the following reasons:

1. The court appears to have misunderstood the facts as they relate to the tolling effect of the bankruptcy preventing McKean or the New Empire Group from pursuing their remedy of specific performance. Plaintiff requests the court to reconsider its opinion as to the tolling effect against the New Empire Group (McKean) pursuing its action against Alpine.

2. The Court's decision appears to be in error as to the effective date in which the statute of limitations commences on a claim under "implied assumpsit" or implied contract.

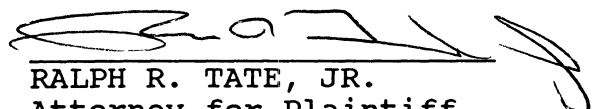
3. The court appears to have been in error in addressing what constitutes a cause of action "founded" upon a written contract.

4. The court's appears to have not fully understood the facts regarding the filing of a full satisfaction of judgment and is requested to reconsider the question of whether the appeal was moot.

Plaintiff respectfully requests that the court allow a rehearing of this matter for the reasons stated.

DATED this 22 day of November 1994.

Respectfully submitted,


RALPH R. TATE, JR.
Attorney for Plaintiff

IN THE SUPREME COURT
OF THE
STATE OF UTAH

John H. Klas,
Plaintiff and Appellee,
v.
Mark O. Van Wagoner and
Kathryn Van Wagoner,
Defendants and Appellants.

No. 930504
880903192

ORDER

This case is moot and is therefore dismissed.

FOR THE COURT

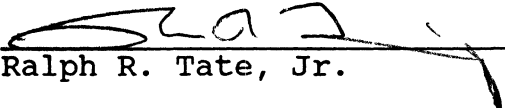
9/14/84
Date

Michael D. Zimmerman
Michael D. Zimmerman
Chief Justice

NOTICE OF MAILING

I mailed ^{2 copies} ~~a copy~~ of the foregoing Memorandum, postage prepaid, this 22 day of November 1994, addressed as follows:

R. Stephen Marshall
Jeremy M. Hoffman
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
P.O. Box 45340
Salt Lake City, UT 84145
Attorneys for Defendants


Ralph R. Tate, Jr.